

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CURTIS D. CRUZ,)	
)	No. CV-07-3020-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND DENYING DEFENDANT'S
MICHAEL J. ASTRUE, Commissioner)	MOTION FOR SUMMARY JUDGMENT
of Social Security,)	
)	
Defendant.)	
)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 13, 15.) Attorney D. James Tree represents Plaintiff; Assistant United States Attorney Frank A. Wilson and Special Assistant United States Attorney Leisa A. Wolf represent Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings.

JURISDICTION

On December 10, 1998, Plaintiff Curtis Cruz (Plaintiff) filed his application for disability insurance benefits. (Tr. 76-78.) Plaintiff alleged disability due to history of crushing left leg injury and resulting surgery, with subsequent back, neck, and hip

1 pain, fatigue, paralysis in both legs, and loss of sphincter
2 control, with an onset date of September 9, 1996. (Tr. 76, 91.)
3 After a hearing on October 2, 2001, (Tr. 555-577) Administrative Law
4 Judge (ALJ) Denny Allen found Plaintiff not disabled in a December
5 13, 2001, decision. (Tr. 374-384.) On April 12, 2005, the Appeals
6 Council vacated the decision and remanded for further proceedings to
7 address: 1) the opinion of the treating physician, including
8 explaining the weight given; 2) Plaintiff's mental impairments,
9 giving specific findings and rationale for each functional area; and
10 3) identify and resolve any DOT conflicts. (Tr. 390-393.) The
11 Appeals Council noted Plaintiff was awarded benefits as of April 1,
12 2002, pursuant to a subsequently filed application. The Appeals
13 Council did not disturb the determination and limited remand to
14 whether Plaintiff was disabled from the date of onset (September 9,
15 1996), through the date last insured (September 30, 2000). (Tr.
16 391.)

17 Supplemental hearings were held February 13, 2006, (Tr. 580-
18 603) and November 29, 2006, (Tr. 606-643) before ALJ R. J. Payne.
19 After hearing testimony from Plaintiff, represented by counsel,
20 medical experts Ollie Ralston, M. D., and W. Scott Mabey, Ph.D., and
21 vocational expert Dennis Elliott (Tr. 583-591, 591-599, 629-639), ALJ
22 Payne denied benefits (Tr. 20-30) and the Appeals Council denied
23 review. (Tr. 9-11.) The instant matter is before this court
24 pursuant to 42 U.S.C. § 405(g).

25 **STATEMENT OF FACTS**

26 The facts of the case are set forth in detail in the transcript
27 of proceedings, and are briefly summarized here. Plaintiff was 40
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1 years old at onset. (Tr. 28.) He has a ninth or tenth grade
2 education. (Tr. 88, 208.) Plaintiff has worked as a restoration
3 construction worker (carpentry and painting), property manager, farm
4 machinery tender, and barber. (Tr. 92.) Although the ALJ
5 acknowledged Plaintiff's history of intermittent marijuana use,
6 "substance abuse issues," and incarceration for delivering
7 controlled substances (marijuana and methamphetamine) in 2005¹ (Tr.
8 24-26, 618-19), he did not perform an analysis pursuant to
9 *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir. 2001).

10 SEQUENTIAL EVALUATION PROCESS

11 The Social Security Act (the "Act") defines "disability" as the
12 "inability to engage in any substantial gainful activity by reason
13 of any medically determinable physical or mental impairment which
14 can be expected to result in death or which has lasted or can be
15 expected to last for a continuous period of not less than twelve
16 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
17 provides that a Plaintiff shall be determined to be under a
18 disability only if any impairments are of such severity that a
19 Plaintiff is not only unable to do previous work but cannot,
20 considering Plaintiff's age, education and work experiences, engage

21 _____
22 ¹Plaintiff tested positive for marijuana on September 21, 1998.
23 (Tr. 71, 213.) He admitted to SSI on December 10, 1998, that he was
24 "drinking too much." (Tr. 114.) Although it is after the last
25 insured date, Dr. Macki noted on August 20, 2001, that Plaintiff
26 "freely admits that he recently attended a 'Hemp-Fest' in Seattle,
27 and it was, as I thought, a big marijuana bash." (Tr. 306.)
28 Plaintiff testified he uses marijuana. (Tr. 628.)

1 in any other substantial gainful work which exists in the national
2 economy. 42 U.S.C. §§ 423 (d)(2)(A), 1382c(a)(3)(B). Thus, the
3 definition of disability consists of both medical and vocational
4 components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.
5 2001).

6 The Commissioner has established a five-step sequential
7 evaluation process for determining whether a person is disabled. 20
8 C.F.R. §§ 404.520, 416.920. Step one determines if the person is
9 engaged in substantial gainful activities. If so, benefits are
10 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
11 the decision maker proceeds to step two, which determines whether
12 Plaintiff has a medically severe impairment or combination of
13 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

14 If Plaintiff does not have a severe impairment or combination
15 of impairments, the disability claim is denied. If the impairment
16 is severe, the evaluation proceeds to the third step, which compares
17 Plaintiff's impairment with a number of listed impairments
18 acknowledged by the Commissioner to be so severe as to preclude
19 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii),
20 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P, App. 1. If the
21 impairment meets or equals one of the listed impairments, Plaintiff
22 is conclusively presumed to be disabled. If the impairment is not
23 one conclusively presumed to be disabling, the evaluation proceeds
24 to the fourth step, which determines whether the impairment prevents
25 Plaintiff from performing work which was performed in the past. If
26 a Plaintiff is able to perform previous work, that Plaintiff is
27 deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),
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1 416.920(a)(4)(iv). At this step, Plaintiff's residual functional
2 capacity ("RFC") assessment is considered. If Plaintiff cannot
3 perform this work, the fifth and final step in the process
4 determines whether Plaintiff is able to perform other work in the
5 national economy in view of Plaintiff's residual functional
6 capacity, age, education and past work experience. 20 C.F.R. §§
7 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137
8 (1987).

9 The initial burden of proof rests upon plaintiff to establish
10 a prima facie case of entitlement to disability benefits. *Rhinehart*
11 *v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172
12 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is met once
13 plaintiff establishes that a physical or mental impairment prevents
14 the performance of previous work. The burden then shifts, at step
15 five, to the Commissioner to show that: (1) plaintiff can perform
16 other substantial gainful activity, and (2) a "significant number of
17 jobs exist in the national economy" which plaintiff can perform.
18 *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

19 Plaintiff has the burden of showing that drug and alcohol
20 addiction ("DAA") is not a contributing material factor to
21 disability. *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001).
22 The Social Security Act bars payment of benefits when drug addiction
23 and/or alcoholism is a contributing factor material to a disability
24 claim. 42 U.S.C. §§ 423 (d)(2)(C) and 1382(a)(3)(J); *Sousa v.*
25 *Callahan*, 143 F. 3d 1240, 1245 (9th Cir. 1998). If there is evidence
26 of DAA and the individual succeeds in proving disability, the
27 Commissioner must determine whether DAA is material to the
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1 determination of disability. 20 C.F.R. §§ 404.1535 and 416.935. If
2 the ALJ finds that the claimant is not disabled, then the claimant
3 is not entitled to benefits and there is no need to proceed with the
4 analysis to determine whether DAA is a contributing factor material
5 to disability. However, if the ALJ finds that the claimant is
6 disabled and there is medical evidence of drug addiction or
7 alcoholism, then the ALJ must proceed to determine if the claimant
8 would be disabled if he or she stopped using alcohol or drugs.
9 *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir. 2001).

10 STANDARD OF REVIEW

11 Congress has provided a limited scope of judicial review of a
12 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
13 the Commissioner's decision, made through an ALJ, when the
14 determination is not based on legal error and supported by
15 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th
16 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
17 "The [Commissioner's] determination that a plaintiff is not disabled
18 will be upheld if the findings of fact are supported by substantial
19 evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)
20 (*citing* 42 U.S.C. § 405(g)). Substantial evidence is more than a
21 mere scintilla, *Sorenson v. Weinberger*, 514 F. 2d 1112, 1119 n.10
22 (9th Cir. 1975), but less than a preponderance. *McAllister v.*
23 *Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v.*
24 *Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir.
25 1988). Substantial evidence "means such evidence as a reasonable
26 mind might accept as adequate to support a conclusion." *Richardson*
27 *v. Perales*, 402 U.S. 389, 401 (1971)(citations omitted). "[S]uch
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1 inferences and conclusions as the [Commissioner] may reasonably draw
2 from the evidence" will also be upheld. *Mark v. Celebrezze*, 348
3 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the
4 record as a whole, not just the evidence supporting the decision of
5 the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.
6 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

7 It is the role of the trier of fact, not this court, to resolve
8 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
9 supports more than one rational interpretation, the court may not
10 substitute its judgment for that of the Commissioner. *Tackett*, 180
11 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
12 Nevertheless, a decision supported by substantial evidence will
13 still be set aside if the proper legal standards were not applied in
14 weighing the evidence and making the decision. *Browner v. Secretary*
15 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).
16 Thus, if there is substantial evidence to support the administrative
17 findings, or if there is conflicting evidence that will support a
18 finding of either disability or nondisability, the finding of the
19 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
20 1230 (9th Cir. 1987).

21 ALJ'S FINDINGS

22 At the onset the ALJ noted that Plaintiff last met the insured
23 status requirements for disability insurance benefits as of
24 September 30, 2000. (Tr. 23.) At step one, the ALJ found Plaintiff
25 had not engaged in substantial gainful activity during the relevant
26 time. (Tr. 23.) At step two, he found Plaintiff has severe
27 impairments of history of crushing left leg injury with subsequent
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1 back, neck, and hip pain. (Tr. 23.) At step three, he found that
2 these impairments do not meet or medically equal the requirements of
3 the Listings. (Tr. 25.) The ALJ found Plaintiff's allegations not
4 totally credible. (Tr. 27.) At step four, he found Plaintiff was
5 unable to perform his past relevant work. (Tr. 27.) The ALJ found
6 transferability of skills was not at issue. (Tr. 28.) At step
7 five, relying on a vocational expert, the ALJ found that there are
8 other jobs in the local and national economies Plaintiff can
9 perform, such as seedling sorter, fast food worker, and sedentary
10 level order clerk. (Tr. 29.) Plaintiff was, therefore, not under
11 a "disability" as defined by the Social Security Act. (*Id.*)

12 ISSUES

13 Plaintiff contends that the Commissioner erred as a matter of
14 law. Specifically, he argues that the ALJ improperly weighed the
15 medical evidence, failed to give specific reasons supporting his
16 credibility determination, and failed to meet his burden at step
17 five of identifying specific jobs Plaintiff is able to perform.
18 (Ct. Rec. 14 at 15.)

19 The Commissioner opposes the Plaintiff's Motion for Summary
20 Judgment and asks that the ALJ's decision be affirmed. (Ct. Rec. 16
21 at 14.) The first issue is dispositive.

22 DISCUSSION

23 A. Weighing Medical Evidence

24 Plaintiff alleges that the ALJ erred by failing to properly
25 credit the opinion of treating physician Victoria Macki, M.D., and
26 of the "the consultative examiner, the state agency consultant, and
27 the medical expert at the hearing" with respect to Plaintiff's
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1 limitations in concentration, persistence, and pace. (Ct. Rec. 14
2 at 18-22.) The Commissioner responds that the ALJ properly weighed
3 the medical evidence.

4 In social security proceedings, the claimant must prove the
5 existence of a physical or mental impairment by providing medical
6 evidence consisting of signs, symptoms, and laboratory findings; the
7 claimant's own statement of symptoms alone will not suffice. 20
8 C.F.R. § 416.908. The effects of all symptoms must be evaluated on
9 the basis of a medically determinable impairment which can be shown
10 to be the cause of the symptoms. 20 C.F.R. § 416.929. Once medical
11 evidence of an underlying impairment has been shown, medical
12 findings are not required to support the alleged severity of
13 symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991).

14 A treating or examining physician's opinion is given more
15 weight than that of a non-examining physician. *Benecke v. Barnhart*,
16 379 F.3d 587, 592 (9th Cir. 2004). If the treating or examining
17 physician's opinions are not contradicted, they can be rejected only
18 with "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821,
19 830 (9th Cir. 1995). If contradicted, the ALJ may reject an opinion
20 if he states specific, legitimate reasons that are supported by
21 substantial evidence. See *Flaten v. Secretary of Health and Human*
22 *Services*, 44 F.3d 1453, 1463 (9th Cir. 1995). In addition to medical
23 reports in the record, the analysis and opinion of a non-examining
24 medical expert selected by an ALJ may be helpful to the
25 adjudication. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995)
26 (citing *Magallanes v. Bowen*, 881 F.2d 747, 753 (9th Cir. 1989)).
27 Testimony of a medical expert may serve as substantial evidence when
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1 supported by other evidence in the record. *Id.*

2 1. Treating Physician

3 Plaintiff contends that the ALJ erred by failing to properly
4 credit Dr. Macki's opinion. In its order following remand, the
5 Appeals Council specifically directed the ALJ to further consider
6 the opinion of treating physician Macki and explain the weight given
7 to her opinion. (Tr. 391-392.)

8 Plaintiff injured his left leg at work on September 9, 1996,
9 the onset date, and was referred to Dr. Macki after being treated in
10 the ER. (Tr. 229.) A brief overview of her treatment notes
11 indicates: (1) On October 2, 1996, Plaintiff was still on crutches
12 and had begun physical therapy; (2) On November 15, 1996, Plaintiff
13 was off crutches, but continued to have pain, and a lack of
14 flexibility and strength in his left leg (Tr. 225); (3) On October
15 23, 1997, Plaintiff told Dr. Macki his legs and feet were numb and
16 tingling the previous night while on the treadmill at physical
17 therapy (Tr. 220); (4) On October 16, 1998, Dr. Macki opined that
18 Plaintiff's back pain is a severe impairment indicating an inability
19 to perform one or more basic work activities (Tr. 255); (5) On
20 January 8, 1999, Dr. Macki stated: "Frankly, I think it is fairly
21 unrealistic to think about getting Pt back to full time useful
22 gainful employment. It would take many years of intensive
23 rehabilitation and I am not sure that he has got the capacities to
24 sustain that." (Tr. 254); (6) In March of 1999, Dr. Macki opined:
25 "I do not have the imagination to place him in a full time job at
26 this point" (Tr. 253); and (7) After she performed a disability exam
27 on October 15, 1999, Dr. Macki assessed emphysema, not yet
28 disabling; chronic back and hip pain, dating to time of crush injury

1 in 1996; chronic neck and arm pain, unsure of exact time of onset or
2 etiology; chronic diarrhea, dating from time of crush injury in
3 1996, and impotence, by report from time of crush injury in 1996.
4 (Tr. 339.)

5 The ALJ states that Dr. Macki's opinions changed over time: "It
6 is clear that while 'disability' was initially endorsed (Exhibit
7 6F/6), this endorsement did not continue (Exhibit 6F/4; see also
8 Exhibits 10F/9, 16F/63-69; 19F/6)." (Tr. 24.)

9 The first exhibit cited by the ALJ details Dr. Macki's visit on
10 September 14, 1998, with a representative concerning Plaintiff's
11 Labor and Industries claim. (Ex. 6F at 6). Dr. Macki opined that
12 Plaintiff's previous work was unsuitable because of his leg length
13 discrepancy and ongoing back problems. (Tr. 212.) She felt
14 optimistic that Plaintiff could perform a job which took into
15 account her concerns, including stress on the back, pressure,
16 pushing, and twisting. (Tr. 212.) She thought Plaintiff should
17 begin a new type of work for two hours a day and gradually work up
18 to eight. (Tr. 212.) This is the opinion the ALJ describes as
19 "initially endorsing disability." (Tr. 24.)

20 The ALJ cites Exhibit 6F at page 4 (Tr. 210) as revealing Dr.
21 Macki's changed opinion that Plaintiff is not disabled. On
22 November 4, 1998, Dr. Macki opined that an IME would be useful, and
23 Plaintiff would need significant job training "in order to be able
24 to do any type of useable work again and would not be able to be
25 employed . . . in a physical capacity, but would rather have to have
26 a more flexible and sedentary job." (Tr. 210.) The additional
27 exhibits referred to by the ALJ (mostly from 1999), do not support
28 the ALJ's characterization. Dr. Macki's later opinions during the

1 applicable time frame endorse Plaintiff's disability. On June 20,
2 2000, Dr. Macki assessed marked impairment caused by chronic back
3 and left leg pain, and moderate impairment caused by COPD. (Tr.
4 369.) On December 20, 2000, (Plaintiff's last insured date is
5 September 30, 2000) Dr. Macki assessed moderate impairment in three
6 areas: chronic back pain, chronic leg pain, and COPD. She opined
7 that further treatment was not likely to restore Plaintiff's ability
8 to work at least half-time. (Tr. 367-368.)

9 The ALJ's findings with respect to the opinions of treating
10 physician Dr. Macki are not supported by substantial evidence. In
11 addition, the ALJ does not provide legally sufficient reasons for
12 rejecting some of Dr. Macki's opinions. This is legal error and
13 contrary to the directive of the Appeals Council after remand.

14 2. Examining and Consulting Psychologists

15 On February 13, 2006, medical expert W. Scott Mabee, Ph.D.,
16 testified. (Tr. 591-599.) Dr. Mabee reviewed Plaintiff's mental
17 health records:

18 [Plaintiff] was seen by the Central Washington
19 Comprehensive Mental Health Center in October of 2000 . .
20 . . . At that time, they made a diagnosis of dysthymia but
21 noted no social or cognitive functional limitations. It
22 was not until later records that the dysthymia or
23 difficulties became more significant. In [Exhibit] 20F,
24 in May of 2002, the Claimant took an overdose of
25 medication in response to pain complaints. He denied
26 depression at that time and there was no formal diagnosis
27 given. Dr. Taze [phonetic] in [Exhibit] 22f did a
28 consultative examination in July of '02, again made a
diagnosis of dysthymia along with standardized testing,
adult intelligence scales indicated borderline
intellectual functioning and a pain disorder secondary to
his general medical condition which is not a DSM
psychiatric diagnosis but a reference to really what would
be considered Axis III features in terms of some general
medical condition that is driving pain complaints
during the period of '96 to 2000, There is no
Axis I condition. There is a borderline intellectual
functioning that would be supported from the subsequent

1 testing. It would likely have been present during that
2 period. . . . So basically any limitations during that
3 period would be the result of borderline intellectual
4 functioning under 12.05 and a mild dysthymia under 12.04.

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6 On the B criteria, I noted moderate for concentration
7 and persistence in pace and having to do with being able
8 to focus on particular verbal information, directions,
9 instructions, so on.

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11 Covering the period of '96 to 2000, primarily
12 as a result of borderline intellectual functioning, [I
13 assessed] moderate limitations for understanding and
14 remembering detailed instructions and being able to carry
15 out detailed instructions, [and] moderate limitations for
16 pace of performance.

17 (Tr. 592-594.) (Emphasis added.)

18 The ALJ rejected Dr. Mabee's assessed moderate limitation as to
19 Plaintiff's ability to maintain concentration, persistence, and
20 pace, but gave no reason for the rejection, other than finding the
21 limitation not supported:

22 Dr. Mabee indicated that under Criteria B for Functional
23 Limitations/Impairment severity, the claimant had
24 "moderately" [sic] limitations for maintaining
25 concentration, persistence and pace; but was only "mild"
26 for all other functional domains of activities of daily
27 living,

28 In an accompanying more detailed mental capacity
assessment, he also indicated that the claimant was
"moderately" limited in his ability to understand,
remember and carry out detailed instructions, and complete
a normal workweek without interruption from
psychologically based symptoms, and perform at a
consistent pace without an unreasonable number and length
of rest periods. While the undersigned understands the
limitations indicated for "detailed work instructions"
given indications of borderline intellectual functioning,
the undersigned does not find the limitations indicated
for completing a normal workweek or a consistent pace
supported.

(Tr. 25.) The ALJ points to nothing in the record in support of

1 this statement. The Commissioner fails to address the argument.
2 The Appeals Council directed further evaluation of Plaintiff's
3 mental impairments, and directed the ALJ to provide specific
4 findings and the rationale for his determination for each
5 functional area. (Tr. 392.)

6 As Plaintiff correctly points out, Dr. Mabee's assessed pace
7 limitation is shared and amplified by other psychologists: a DDS
8 adjudicator assessed "marked" difficulties in maintaining
9 concentration, persistence or pace in September of 2002 (Tr. 487),
10 noting that testing by Jay Toews, Ed.D., suggests Plaintiff's
11 limited pace may be due to neuropsychological deficits. (Tr. 489,
12 referring to Tr. 544-548.)

13 Contrary to the directive of the Appeals Council following
14 remand, the ALJ rejected these psychologists' opinion that Plaintiff
15 is at least moderately limited in concentration, persistence and
16 pace without providing a reason. This is legal error and the
17 finding is unsupported by substantial evidence.

18 **B. Remedy**

19 There are two remedies where the ALJ fails to provide adequate
20 reasons for rejecting the opinions of a treating or examining
21 psychologist or physician. The general rule, found in the *Lester*
22 line of cases, is that "we credit that opinion as a matter of law."
23 *Lester*, 81 F.3d at 834; *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th
24 Cir. 1990); *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir. 1989).
25 Under the alternate approach found in *McAllister, supra*, a court may
26 remand to allow the ALJ to provide the requisite specific and
27 legitimate reasons for disregarding the opinion. See also *Benecke*,
28 379 F.3d at 594 (court has flexibility in crediting testimony if

1 substantial questions remain as to claimant's credibility and other
2 issues). Where evidence has been identified that may be a basis for
3 a finding, but the findings are not articulated, remand is the
4 proper disposition. *Salvador v. Sullivan*, 917 F.2d 13, 15 (9th Cir.
5 1990)(citing *McAllister*); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1202
6 (9th Cir. 1990).

7 In this case, the ALJ was directed by the Appeals Council to
8 provide reasons for the weight given to Dr. Macki's opinion, and to
9 do so with respect to Plaintiff's assessed mental impairments. The
10 ALJ did not do so. Accordingly, it appears that these opinions
11 should be credited as a matter of law. When credited as a matter of
12 law, it appears from the opinions of several psychologists
13 (including the testifying psychologist) that Plaintiff is disabled,
14 and was disabled physically (based on Dr. Macki's opinion) from
15 October 16, 1998, through the last insured date of September 30,
16 2000. However, the record contains evidence of substance abuse
17 which is not addressed and is the province of the ALJ, not this
18 court. Accordingly, remand is required to address the issue of drug
19 and/or alcohol abuse.

20 CONCLUSION

21 The ALJ's decision is based on legal error and not supported by
22 substantial evidence. Accordingly,

23 IT IS ORDERED:

24 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
25 **GRANTED**. The matter is remanded to the Commissioner of Social
26 Security for further proceedings consistent with this decision and
27 sentence four of 42 U.S.C. §§ 405(g).

28 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is

1 **DENIED.**

2 3. An application for attorney fees may be filed by separate
3 motion.

4 The District Court Executive is directed to file this Order and
5 provide a copy to counsel for Plaintiff and Defendant. Judgment
6 shall be entered for Plaintiff and the file shall be **CLOSED**.

7 DATED March 19, 2008.

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9 S/ CYNTHIA IMBROGNO
10 UNITED STATES MAGISTRATE JUDGE
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